BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

REBA CARRON	)	
Claimant	)	
	)	
VS.	)	
	)	
GOLDEN EAGLE CASINO	)	
Respondent	)	Docket No. 1,030,278
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 5, 2006 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The claimant alleged she suffered a series of repetitive injuries from April 2006 through June 1, 2006. At the preliminary hearing, she sought medical treatment and temporary total disability compensation. The Administrative Law Judge (ALJ) found the evidence failed to show that claimant's need for treatment, if any, was the result of her employment with respondent. And the ALJ further determined claimant failed to provide respondent with timely notice of accidental injury.

The claimant requests review of whether the she gave notice of her injury and whether her current need for medical treatment is due to injury suffered working for respondent.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a slot attendant for the respondent. Her job duties included carrying money bags weighing 10 to 23.5 pounds and filling slot machines. She would pay patrons for jackpots and occasionally help the patrons carry their coins to the cashier. The claimant would get the money bags out of the cage, sign for them and carry them over her shoulders to the machines.

Claimant testified she had been having back pain for awhile and then described a specific incident where she injured her lower back when she twisted while putting the money into the slot machines sometime around the middle of May 2006. On May 17, 2006, the claimant sought medical treatment with her personal physician Dr. Pete Rosa. Claimant further testified that she told Dr. Rosa she had twisted the wrong way and had an acute onset of back pain. She also told the doctor she had back trouble before that incident but had never sought medical treatment. Dr. Rosa's office note of the May 17, 2006 visit contained the following history of injury:

> Here with the complaint of back pain. Said the patient twisted the wrong way and has had acute onset of back pain. It started in her low back and goes up to between her shoulder blades. It is hard to get up and down from a chair. She has had trouble before but she never had to go to a doctor. She does do a lot of lifting at the casino where she lifts bags and money. She also works at Fargo Assembly Line where she does a lot of twisting. Both of these activities seem to hurt.[1]

Dr. Rosa prescribed medications for her back complaints.

The claimant continued working for respondent even though her back was hurting. And because of respondent's policy she had informed security personnel that she was taking prescribed narcotic medication for her back. Claimant testified that her back pain had started in April and progressively worsened through the last day worked for respondent.

On June 5, 2006, Dr. Rosa issued claimant an excuse from work. The script excused claimant from June 2 through June 12 "due to illness". But claimant denied she was sick and stated that the note pertained to her lower back condition. The claimant had the doctor fax all her off work and restriction slips to respondent. On June 13, 2006, Dr. Rosa again excused claimant from working June 13 through June 20. Finally, on June 19, 2006, Dr. Rosa issued claimant restrictions against lifting greater than 10 pounds.

Claimant testified that after she was given restrictions she talked to Matt Senario, in human resources for respondent, to see if there was work available within her restrictions. She further told him that she had hurt her back because of moving money bags.

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[1] P.H. Trans., Cl. Ex. 1.

The claimant was terminated by the respondent on June 27, 2006. Claimant also worked a second full-time job with Fargo splicing wires to make harnesses for Harley-Davidson motorcycles. She further testified she did not have an injury while working for Fargo and that Fargo had accommodated her restrictions by Dr. Rosa. She terminated her employment with Fargo in September 2006.

The claimant testified:

Q. Okay. I apologize. You had talked to people at Golden Eagle Casino about your back being hurt, correct?

A. Yes, sir.

Q. You didn't tell them that you injured it at work, did you?

A. No, sir.

. . .

Q. Why didn't you tell them that you hurt it at work?

A. I thought cause I went to security and gave them my drugs cause they were narcotics and they knew what it was for, that it was for my lower back pain and I was working with them filling the bags and with them having so many problems with people hurting their backs there that they would actually know that's what it was for.

Q. You didn't think it was necessary to tell them, you thought they knew you hurt yourself when they had the documents?

A. Well, basically in security out there, they would already figure that out. They would know that's why I had them.

Q. When you talked to Matt in the middle part of June, did you tell him moving the bags of coins was what was bothering your back you thought?

A. Yes.

MR. COOPER: That's All.

JUDGE BENEDICT: That it bothered her back as of that date?

BY MR. COOPER:

Q. Well, moving the coins - - you hadn't worked since June 2nd.

A. Correct.

Q. So did you tell him that the reason you had hurt your back was because of the coins, that's why you hadn't been at work?

A. Correct.[2]

Finally claimant clarified her earlier testimony that when she said she had not told anyone at the casino that she had hurt her back at work she was referring to those who worked inside the casino but that human resources is not located in the casino and she had discussed her injury with Matt Senario in human resources.

At the request of claimant's attorney, Dr. Sergio Delgado examined the claimant on September 14, 2006. Dr. Delgado was provided a history of progressive back pain related to carrying bags of coins to fill the slot machines. Dr. Delgado diagnosed lumbosacral strain superimposed on degenerative changes in claimant's lower back. He recommended that claimant be referred for physical therapy, provided anti-inflammatories and analgesics and be placed in a work reconditioning program. If claimant's complaints continued lumbar epidural steroid injections might be indicated. Finally, the doctor concluded claimant's complaints were caused by her work activities for respondent.[3]

The claimant testified that as she performed her repetitive work activities for respondent she began to experience pain which worsened through her last day worked for respondent. She further detailed a specific incident that led her to seek medical treatment but she testified that she continued to work after that incident and her back condition progressively worsened. Dr. Delgado's September 14, 2006, report attributed claimant's medical condition to her repetitive work for respondent. Claimant has met her burden of proof that she suffered accidental injury arising out of and in the course of her employment with respondent.

The ALJ determined the evidence failed to show claimant provided respondent notice of the accident within ten days or that respondent had actual notice or that just cause was shown to extend the time for providing notice.

The date of accident must be established in order to determine whether claimant provided timely notice. It must be noted that this is an alleged repetitive trauma injury. The date of accident in this case is not necessarily the last day worked as has, up to this point, been determined by a long line of cases.[4]

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[2] *Id.* at 28-30.

[3] *Id.*, Cl. Ex. 1.

[4] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); and *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003)

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[5] (Emphasis added.)

In this case, claimant was neither taken off work nor restricted from performing the work which caused her condition by an authorized physician. She went to her personal physician and returned to work for awhile before the doctor then took her off work.

The claimant attributed her pain to her work for this respondent and was aware her condition was worsening as she continued working. However, K.S.A. 2005 Supp. 44-508(d) makes no mention of the date of accident being tied to a claimant's realization as to the cause of her problems.

A possible date of accident could be when a claimant is diagnosed with a work-related condition, as noted in K.S.A. 2005 Supp. 44-508(d)(2). But that fact must be communicated to the claimant "in writing." And in this case there is no indication when or if such fact was communicated to claimant in writing.

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[5] K.S.A. 2005 Supp. 44-508(d).

The last "date of accident" possibility contained in the statute is dependent upon a claimant giving written notice to the employer of the accident. Here, it was claimant's uncontroverted testimony that when she met with Matt Senario sometime around June 19, 2006, she gave him the originals of her restrictions and off work forms. And as previously noted she told Mr. Senario that carrying the coins had caused her injury and that was why she was off work and provided with restrictions. Under the new statute for repetitive trauma injuries this information coupled with presentation of the off work slips and restrictions would constitute written notice and would establish the accident date for her repetitive trauma injury. Accordingly, claimant provided timely notice.

The date of accident when claimant met with Mr. Senario would also create the result of having a date of accident after the last date claimant worked. When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In any event, the claimant must still meet the burden of proof that the injury arose out of and in the course of employment. That fact alone should allay any concerns that the determination of an accident date after the last day worked or at a time when the injured worker was no longer employed leads to an unreasonable result.

K.S.A. 2005 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that her condition was diagnosed as work related or the date she gave written notice to the employer of the injury. There was no evidence claimant received written notification that her condition was diagnosed as work related before she provided written notice to the employer.

But claimant did provide respondent written notice of her injury on approximately June 19, 2006. Consequently, under the plain language of the statute, her date of accident is June 19, 2006, and her notice was timely for the series of microtraumas occurring through her last day worked.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated October 5, 2006, is reversed and this matter remanded to the Administrative Law Judge for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

[6] K.S.A. 44-534a.

[7] K.S.A. 2005 Supp. 44-555c(k).